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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAEVON JAMELL LOVE,

Defendant and Appellant.

C084190

(Super. Ct. Nos. 15F06950,
14F06720)

While defendant was released on pretrial bail for assault charges, he shot a gun from a moving car and hit a pedestrian. On appeal, defendant contends his due process rights were violated by the trial court's joinder of the offenses. He also contends the matter should be remanded to permit the trial court to exercise its discretion to strike (1) the firearm use enhancements, pursuant to Penal Code section 12022.5, subdivision (c),¹ and (2) the serious prior felony conviction

¹ Undesignated statutory references are to the Penal Code.

enhancement (§ 667, subd. (a)), pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2). The People concede each applies retroactively. The parties also agree defendant was entitled to additional custody credit. We will remand this case for the trial court to correct the custody credit calculation and exercise its discretion to strike the firearm enhancements and the serious prior felony conviction enhancement. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. Assault on J.L. (counts one and two)

In the summer of 2014, defendant's girlfriend and daughter lived in the same apartment complex as J.L. J.L. saw defendant smoking marijuana in the complex common area and complained to the management. Afterward, defendant demanded J.L. come outside and fight, but J.L. ignored him.

A few weeks later, on July 31, 2014, J.L. arrived home at 9:20 p.m. and saw defendant outside with five of his friends. As J.L. walked past, defendant asked if he was afraid. J.L. replied no and went upstairs to his apartment. Fifteen minutes later, J.L. walked back to his car to get something. As J.L. returned to his apartment, defendant and his friends hit J.L. on his back and head, causing J.L. to fall to the ground. Defendant and three others continued hitting and kicking J.L. for three minutes until J.L. pulled a closed knife from his pocket and hit one of them. Defendant ripped off J.L.'s shirt and used it to "confront" J.L. Defendant eventually backed away. J.L. suffered a broken nose, a swollen eye, and pain and bruising to his ribs and back.

On the evening of September 13, 2014, J.L. saw defendant with a gun, sitting in the passenger seat of his friend's car.

In September 2015, defendant was charged in case No. 14F06720 with assault on J.L. likely to cause great bodily injury (§ 245, subd. (a)(1); count one) and battery on J.L.

causing serious bodily injury (§ 243, subd. (d); count two).² It was further alleged defendant had a prior serious felony conviction. (§ 667, subds. (b)-(i).)

On October 7, 2015, defendant was released on bail.

On December 31, 2015, defendant, who was again incarcerated, spoke with his girlfriend M.B. via telephone. Defendant asked M.B. whether she had spoken with police, and M.B. responded she “d[idn’t] know what I’m supposed to tell him.” Defendant responded, “basically just tell them the truth: [defendant] didn’t do nothing to the guy. I lied – I lied to see can I get him – put, put in jail because he cheated on me and I was very angry at him and that’s why I said all that.” A recording of the call was played for the jury.

2. Shooting at a vehicle (counts three through seven)

The morning of November 8, 2015, T.R. and his wife J.F. went to the market. T.R. was not wearing his glasses. As T.R. was backing up his car to exit the parking spot, he honked to alert another car that was backing up at the same time. The other car stopped, and T.R. safely exited the parking lot. As T.R. was driving away, he saw the same car about to hit him, so he honked his horn. The car pulled behind T.R.’s car, and T.R. heard two gunshots. J.F. said, “[t]hey [are] shooting at us.” T.R. looked in his rearview and side mirrors and saw a passenger with a gun leaning out of the car. J.F. ducked and screamed that a pedestrian (later identified as P.G.) had been shot. The other car drove in a different direction, and T.R. sped toward home.

When T.R. got home 10 minutes later, he called 911 and said a Black man in the back of a maroon (or burgundy) Buick with a broken front grill had shot at them. T.R. told the 911 operator the driver was Hispanic and there was a passenger in the front with

² This charge (count two) was later dismissed upon the People’s motion.

long hair, while the shooter was Black, had a baseball cap, and wore his hair in a ponytail. A recording of T.R.'s 911 call was played for the jury. In a police field show-up the day of the incident, T.R. and J.F. each identified Allan Davis as the driver and defendant as the shooter. J.F. and T.R. also identified defendant as the shooter at trial via the same photos the police showed them after the incident, although J.F. also testified both the driver and defendant were shooting at them. Although T.R. told police the day of the incident that he saw the shooter on the left side of the car, at trial T.R. testified he saw the shooter on the passenger side of the car. J.F. told police the day of the incident that the back left passenger was the shooter. At trial, J.F. initially testified the shooter was in the front passenger seat, but later testified she had told police the shooter was in the back seat.

During trial, the jury was shown video surveillance from the store, and T.R. testified he recognized defendant in the video; he was wearing a baseball cap and had his hair in a ponytail. J.F. testified she suffered from mental illness, including depression, and was currently on medication. She also told an employee of the district attorney's office that she suffers from schizophrenia and her medication intake had been inconsistent during the several months before trial.

At trial, P.G. testified he had been walking to work and listening to music on his headphones when he heard a loud noise. He realized he had been shot in the shoulder.

Police found a maroon four-door Buick with a broken front grill parked in front of a house a half mile away from the market. Four Black men were standing in the driveway, including Allan Davis, who owned the suspect car, and defendant, who was wearing a ball cap and standing 10 feet away from a white SUV. Defendant was the closest of the men to the SUV. Inside defendant's pocket was a set of keys, including the key to the suspect vehicle. Police searched inside the car and found a live bullet behind the driver's seat, a bullet hole in the roof, and Davis's driver's license. Police also found

a loaded 9-millimeter semiautomatic pistol behind the left front tire of the white SUV. The bullet in the chamber matched the bullet found in the back of the maroon Buick. There were no fingerprints or DNA on the gun. Defendant and Davis each tested positive for gunshot residue, indicating each fired a gun, was in the vicinity of a gun being fired, or touched something with gunshot residue. Davis had more gunshot residue particles than defendant. The prosecution's witness testified gunshot residue particles dissipate quickly, and it was possible for a shooter to not have gunshot residue on their hands. In addition, it was impossible to identify the shooter based on the test results and there was no significance to the number of particles found on someone's hands.

In March 2016, defendant was charged in case No. 15F06950 with being a felon in possession of a firearm (§ 29800, subd. (a)(1)), shooting at an occupied vehicle (§ 246), and three counts of assault with a semiautomatic firearm on J.F., T.R., and P.G. (§ 245, subd. (b)). It was also alleged defendant had a prior strike (§ 667, subds. (b)-(i)) and that, except for the section 29800 charge, he was on bail when he committed the crimes (§ 12022.1). With respect to the assault charges, it was further alleged defendant personally used a firearm. (§ 12022.5, subd. (a)(1).)

3. Consolidation of charges, trial, and conviction

In June 2016, the trial court granted the prosecution's motion to consolidate cases 14F06720 and 15F06950.³ Defendant was charged with assault on J.L. likely to cause great bodily injury (§ 245, subd. (a)(1); count one), two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1); counts two (Sept. 13, 2014) and seven (Nov. 10, 2015)), shooting at an occupied vehicle (§ 246; count three), and three counts

³ The consolidated charges originally included battery on J.L. causing serious bodily injury (§ 243, subd. (d); count two), but this count was dismissed in October 2016 based on the prosecutor's motion. The trial court ordered the remaining charges renumbered. We will refer to the renumbered counts, *post*.

of assault with a semiautomatic firearm on J.F., T.R., and P.G. (§ 245, subd. (b); counts four, five, & six). With respect to counts four through six, it was further alleged defendant used a semiautomatic firearm. (§ 12022.5, subds. (a) & (d).) It was further alleged defendant had a prior serious felony conviction (§ 667, subds. (b)-(i)) and that, with respect to counts three through seven, defendant committed the crimes while released from custody (§ 12022.1).

In October 2016, defendant moved to separate the trials for the July 2014 and November 2015 offenses. Although the charges involved assault, defendant argued they were different because of the firearm use in the shooting charges. In addition, according to defendant, there were no issues of cross-admissibility, neither case was a strong one, and the counts related to the car shooting were inflammatory in nature, including the likelihood the jury might permit knowledge of his other crimes to “tip the scale against him.”

The trial court denied defendant’s motion, reasoning counts one and two had the same witness, namely J.L. In addition, the remaining counts involved the same class of crimes (assault). Defendant had not established prejudice, since the charges were not unusually likely to inflame the jury, especially with “proper instructions,” to consider each count separately. Also, there was no evidence that one case was weaker than the other. Finally, defendant had not objected to the consolidation.

During the November 2016 trial, the prosecutor argued during closing argument that “[t]he victims in this case deserve justice. . . . The Defendant should not be able to run around, with immunity, victimizing these poor people. [¶] You have everything that you need to find him guilty of the charges.” The prosecutor also discussed defense counsel’s argument that there was “no connection” between the different pieces of circumstantial evidence: “[the law] tells you to look at the totality of the evidence, to use your common sense, to look at the big picture . . . to look at all the evidence together.”

The prosecutor continued, noting defense counsel had pointed out inconsistencies, but “[a]re we to believe that the Defendant is the unluckiest person to have ever walked the earth? [J.L.]’s lying to take him down, over a parking spot? [J.F.] and [T.R.] mistakenly identified him as the person who shot at their car? That he just happened to be less than a mile away [from] where the shooting occurred? It was just coincidence that he was standing feet away from where that gun was found or that he had the keys to the suspect vehicle, just a fluke that the caliber of that gun matches the caliber of the bullet in the car, that there’s some innocent explanation for him having [gunshot residue] on his hands . . . ? [¶] That is not reasonable doubt.”

The trial court gave various instructions to the jury, including that it “must follow the law as I explain it to you, even if you disagree with it. [¶] If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” The trial court continued, “[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.”

On November 8, 2016, a jury convicted defendant of counts one (§ 245, subd. (a)(4)), and three through seven (§§ 246, 245, subd. (b), 29800, subd. (a)(1)).⁴ With respect to counts four through six, the jury also found true that defendant used a firearm. (§ 12022.5, subds. (a) & (d).) With respect to counts three through seven, the jury also found true that defendant committed the crimes while released on bail. (§ 12022.1.) In subsequent proceedings, the trial court found true defendant incurred a prior serious felony conviction. (§§ 667, subds. (b)-(i).)

⁴ The jury found defendant not guilty of count two (being a felon in possession of a firearm (§ 29800, subd. (a)(1))).

On March 3, 2017, the trial court sentenced defendant to state prison to serve an aggregate term of 30 years four months, as follows:

Twelve years for count four (the midterm of 6 years, doubled due to the strike) (§ 245, subd. (b)) plus 4 years (the midterm) for the firearm enhancement (§ 12022.5, subd. (a)), 2 years consecutive for count one (one third the midterm of 3 years, doubled due to the strike) (§ 245, subd. (a)(4)), 4 years consecutive for count five (one third the midterm of 6 years, doubled due to the strike) (§ 245, subd. (b)) plus 1 year 4 months for the firearm enhancement (one third the midterm) (§ 12022.5, subd. (a)), 6 years concurrent for count six (the midterm) (§ 245, subd. (a)(4)) plus 4 years concurrent for the firearm enhancement (the midterm) (§ 12022.5), 4 years for count seven (the midterm) (§ 29800, subd. (a)(1)) stayed pursuant to section 654, 10 years for count three (§ 246) (the midterm of 5 years, doubled due to the strike) plus 2 years for the on bail enhancement (§ 12022.1, subd. (b)) stayed pursuant to section 654, 5 years for the prior serious felony conviction (§ 667, subd. (a)), and 2 years for the on-bail enhancement (§ 12022.1, subd. (b)).

The trial court also imposed various fines and fees and awarded defendant 722 days custody credit, with 628 days actual and 94 days conduct credit. (§ 2933.1, subd. (c).) The custody credit was based on the probation report's calculation that used an end date of January 27, 2017, the originally scheduled date for the sentencing hearing. The trial court continued the hearing to March 3, 2017 to give defense counsel enough time to analyze the probation report.

Defendant filed a timely appeal.

DISCUSSION

I

Joinder of Charges

Defendant contends the trial court erred in consolidating the charges brought against him. We conclude there was no error. In a related argument, defendant contends he received ineffective assistance of counsel because his trial counsel failed to object to the prosecutor's arguments during closing argument or request a limiting instruction. We reject this contention.

1. Joinder of Assault on J.L. and Shooting Charges

Section 954 provides that "[a]n accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately." "Offenses are of the same class when they possess common attributes." (*People v. Leney* (1989) 213 Cal.App.3d 265, 269.) The law prefers consolidation or joinder of charges. (*People v. Hartsch* (2010) 49 Cal.4th 472, 493.)

As defendant acknowledges, both incidents involved assaultive crimes and thus are of the same class, meaning joinder is proper under section 954. (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1433 (*Ybarra*).) As such, he "can only predicate error in the denial of severance on a clear showing of potential prejudice. [Citations.] We review the trial court's denial of defendant's severance motion for an abuse of discretion. [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 934.) When determining whether a trial court has abused its discretion in denying severance, we only consider "the facts before the court at the time of the ruling." (*Ybarra, supra*, at p. 1433.)

The determination of prejudice depends on the circumstances of each case.

“ ‘Refusal to sever may be an abuse of discretion where: (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns into a capital case. [Citations.]” (*People v. Sandoval* (1992) 4 Cal.4th 155, 172.)

Even if the trial court’s severance ruling was correct at the time, we will still reverse judgment “if the defendant shows that joinder resulted in ‘gross unfairness’ amounting to a denial of due process. [Citations.] In determining whether there was such gross unfairness, we view the case as it was tried, including a review of the evidence actually introduced in the trial . . . and other trial related matters, such as the prosecutor’s closing argument.” (*Ybarra, supra*, 245 Cal.App.4th at p. 1434.) The defendant bears the “high burden” of establishing gross unfairness amounting to a due process violation. (*Id.* at p. 1438.) A defendant “must demonstrate a ‘reasonable probability’ that the joinder affected the jury’s verdicts.” (*Ibid.*)

As defendant acknowledges, based on the information available when the trial court denied defendant’s motion to sever prior to trial, there was no abuse of discretion. Neither case was inflammatory, and no death penalty crimes were charged. Although the evidence was not cross admissible, except for J.L.’s testimony regarding the assault and defendant’s gun possession in September 2015, this is not sufficient to establish prejudice. (See *People v. Geier* (2007) 41 Cal.4th 555, 577 [“the absence of cross-admissibility alone would not be sufficient to establish prejudice where (1) the offenses were properly joinable under section 954, and (2) no other factor relevant to the

assessment of prejudice demonstrates an abuse of discretion”], overruled on other grounds in *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2d 314].)

Defendant’s main contention is that the evidence, instructions, and argument at trial resulted in gross unfairness amounting to a due process violation with regard to the shooting counts.⁵ According to defendant, the J.L. assault case was “substantially stronger” than the shooting case because J.L.’s identification of defendant as the perpetrator was stronger and more reliable than T.R. or J.F.’s. In addition, defendant argues, the prosecution improperly suggested during closing argument that the “mere aggregation of charges pointed to guilt,” and the trial court failed to give a contrary instruction.

Contrary to defendant’s characterization of the identification evidence against him in each case, we conclude the identification evidence is strong in each case. Although T.R. and J.F. had some discrepancies in their testimony versus what they told police, including which side of the car defendant leaned out of and whether he was in the front or the back seat, T.R. and J.F. each identified defendant as the shooter and Davis as the driver to the police soon after the event and again in court. T.R. and J.F.’s testimony is supported by video surveillance showing defendant in the store with T.R. just prior to the incident. In addition, after the incident, police found defendant near Davis’s car with a working key in his pocket. Defendant also stood only 10 feet from the white SUV where the gun was found hidden in the tire well. Although Davis may have had more gunshot residue on his hands, defendant’s hands also had residue. In addition, the prosecution

⁵ As the People note, because defendant did not renew his motion to sever, he may not use this as a basis to challenge on appeal the trial court’s pretrial denial of his motion to sever. (*People v. Ervin* (2000) 22 Cal.4th 48, 68.) But, as previously stated, we still must consider whether defendant has established that consolidation caused gross unfairness and deprived him of a fair trial. (*Ibid.*)

witness explained there was no significance to the number of particles found on someone and it was impossible to identify the shooter based on the test results.

We also reject defendant's contentions regarding the prosecution's closing argument and the jury instructions. We read the prosecutor's comment regarding defendant being the "unluckiest person to have ever walked the earth" to address each crime separately and argue the direct and circumstantial evidence for each crime was strong enough to find no reasonable doubt separately for each count. Even if, as defendant contends, the prosecutor suggested the assault on J.L. bolstered the shooting charges, the trial court corrected any potential misunderstanding with the instructions. The jury was instructed that it "must follow the law" as explained by the court, not as by the lawyers. In addition, the trial court made clear that "[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." Given that the prosecutor's comments were fleeting and minor, the evidence in each case was sufficient, and the jury was instructed to consider each count separately, we conclude defendant has failed to demonstrate a reasonable probability that the joinder affected the jury's verdict.

2. Ineffective Assistance of Counsel

We reject defendant's contention he received ineffective assistance of counsel because his trial counsel failed to object to the prosecutor's arguments during closing argument or request a limiting instruction. As explained above, we do not agree with defendant's interpretation of the prosecutor's statements during closing argument. Thus, there was no improper argument, no failure to object, and no need to request a limiting instruction. Further, the trial court corrected any potential misunderstanding by instructing the jury to consider each count separately.

II

Firearm Enhancements

Senate Bill No. 620, which went into effect on January 1, 2018, (Stats. 2017, ch. 682, §§ 1-2) amends sections 12022.5 and 12022.53 to grant the trial court discretion pursuant to section 1385 to strike or dismiss firearm enhancements that were previously mandatory. “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

At issue is whether the amendment to section 12022.5, potentially providing for lesser punishment, is retroactive to cases not yet final. (See *In re Estrada* (1965) 63 Cal.2d 740; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In *People v. Woods* (2018) 19 Cal.App.5th 1080, at page 1091, this court explained: “because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply.” (Accord *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) In sentencing defendant, the trial court used a combination of midterm, concurrent, consecutive, and stayed sentences. The record does not indicate whether the trial court would have exercised its discretion to not strike the firearm enhancements. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

Since defendant’s conviction was still on appeal and therefore not yet final, the amended section 12022.5 applies to his case. The appropriate remedy is to remand this case to the trial court to exercise its discretion to strike the firearm

enhancements under section 12022.5, subdivision (c). (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Prior Serious Felony Conviction Enhancement

Similar to the firearm enhancements, at the time defendant was sentenced, the court had no discretion to strike an enhancement for a prior serious felony conviction. (See former § 667, subd. (a); former § 1385, subd. (b).) Senate Bill 1393, which went into effect on January 1, 2019, amends sections 667, subdivision (a), and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction allegation for sentencing purposes.

Like the amendments to section 12022.5, there is nothing in the amendments to sections 667 and 1385 suggesting the Legislature intended them to apply prospectively only, so they apply retroactively to this case, which was not yet final when they went into effect. (*In re Estrada* (1965) 63 Cal.2d 740; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.)

As previously discussed, the trial court did not clearly indicate it would have declined to exercise discretion to lessen defendant's sentence. Accordingly, the appropriate remedy is to remand the matter. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"].)

III

Credits

As both parties acknowledge, the trial court erroneously awarded defendant custody credits based on the probation report's calculation of a sentencing hearing on January 27, 2017. Given that the sentencing hearing took place on March 3, 2017, defendant is entitled to an additional 35 days actual and 5 days conduct credit, or 40 days

total. (§§ 2900.5, subd. (a), 2933.1, subd. (c).) We shall modify the judgment accordingly. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.)

DISPOSITION

The judgment is modified to award 762 days of custody credit (actual and conduct). The matter is remanded for the trial court to consider exercising its discretion under (1) Penal Code section 12022.5, subdivision (c), to strike the firearm enhancements and (2) Penal Code sections 667 and 1385 to strike the prior serious felony conviction enhancement. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
HULL, Acting P. J.

_____/s/
DUARTE, J.